Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1044

WILLIAM C. BUSH,
Petitioner

vs.

WILLIAM R. LUCAS,
Respondent

APPENDICES B THROUGH G TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

B: DISTRICT COURT DECISION;
C, D & E: ADMINISTRATIVE DECISIONS;
F: CONST. PROVS., STATS, & REGS INVOLVED;
G: MS OPINION, HERNANDEZ v. LATTIMORE

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APPENDICES
B
THROUGH
G

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Northeastern Division

WILLIAM C. BUSH,)
)
Plaintiff,)
)
-vs.-) No. CA 76-P-0962-NE
)
WILLIAM R. LUCAS,)
)
Defendant.)

O R D E R

For reasons set forth in the accompanying Memorandum of Opinion, the court concludes that defendant's motion for summary judgment is due to be granted. Accordingly, it is ORDERED, ADJUDGED and DECREED that, there being no genuine issues as to any material fact, summary judgment is hereby granted in favor of defendant William R. Lucas.

Costs to be taxed against plaintiff.

Done this the 4th day of February,1977.

s/ Sam C. Pointer, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Northeastern Division

WILLIAM C. BUSH, Plaintiff,
-vs.- No. CA 76-P-0962-NE
WILLIAM R. LUCAS, Defendant.

MEMORANDUM OF OPINION

This cause arises upon defendant's motion for summary judgment. Plaintiff, William Bush, seeks damages from the Director of the George C. Marshall Space Flight Center, William R. Lucas, for allegedly false statements Lucas made about Bush on June 25, 1975 and for Bush's demotion as a federal government employee, with attendant reduction in salary. Bush alleges that his demotion and Lucas' comments were motivated by Lucas' malicious intent to punish Bush for public comments he had made about his job.

Plaintiff is an aerospace engineer and for several years has been a civil service employee at Marshall Space Flight Center. On May 15, 1975, in an interview on Huntsville Television Station WHNT, Bush stated that he was not productively employed. The same day, The Huntsville Times quoted Bush

as having said that his position at the Space Flight Center was "a falsehood, a travesty and worthless." On June 16, 1975 Bush appeared on another WHNT-TV interview in which he made statements to the effect that he had meaningful work to do only a small percentage of each day. Mr. Bush's various statements were disseminated nationally by the wire services and appeared in newspapers in at least three states other than Alabama.

On June 25, 1975, Lucas presided at a press conference held in commemoration of the Center's fifteenth anniversary. After what Bush asserts was the conference's conclusion, a WHNT television reporter asked Lucas to respond to Bush's charges that he did not have enough meaningful work to do. Bush claims he was labeled a liar by Lucas' reply that "I have had [Bush's] statement investigated and I can say unequivocally that such a statement has no basis in fact." This statement forms the basis of Bush's defamation claim.

In August 1975 an adverse personnel action was initiated to remove Bush from his position. After a hearing, Lucas, as deciding official, notified Bush of his reduction in grade from GS-14 to GS-12. Bush

appealed the adverse action to the United States Civil Service Commission, which sustained the agency's action. This demotion forms the basis of Bush's claim that Lucas conspired to deprive plaintiff of his first amendment rights of free speech and to petition Congress.

DEFAMATION CLAIM

While defendant claims an absolute official immunity from liability for his statements impinging Bush's truthfulness, plaintiff urges that if any immunity is available, it is qualified by a good faith standard. For purposes of this motion, the court will take as true plaintiff's assertion that Lucas' press conference statement was false and motivated by malice. Thus, summary judgment in favor of Lucas would be appropriate only if he is protected by an absolute immunity. A review of the relevant case law indicates that plaintiff is indeed protected by no less than absolute immunity from liability for this defamation claim.

Barr v. Matteo, 360 U. S. 564 (1959) is controlling on this point. In *Barr* the Supreme Court held that, despite allegations of malice, statements made by a federal

executive official within the "outer perimeter" of his line of duty fall within the privilege of absolute immunity against defamation actions. The defendant in *Barr*, Acting Director of the Office of Rent Stabilization, issued a press release in which he announced his intention to suspend certain employees for conduct for which the agency had been criticized. The conduct being punished (questionable terminal leave payments to employees who were then rehired) had been subject to considerable Congressional and news media inquiry. The employees concerned brought an action for defamation against the Acting Director, charging that the news release defamed them. After reviewing the scope of defendant's duties as Acting Director, the Court concluded that the press release fell within the "outer perimeter" of defendant's official responsibilities and that plaintiffs were absolutely barred from pursuing the defamation claim based on the release.

In the instant case, Lucas' July 25, 1975 statement to the press fell well within the outer perimeter of his duties as MSFC Director. Although Bush's complaint alleges that Lucas' statement was beyond

the "outer perimeter" of his duties, plaintiff offers no evidence to support his conclusion.[1] Conversely, defendant's affidavit

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1. While the affidavit of Leslie W. Ball attempts to contradict defendant's evidence as to the scope of his duties, it is conclusory only and does not raise any serious or bona fide dispute. Furthermore, the affidavit of Barry J. Casebolt, by asserting that the June 25, 1975 press conference had been adjourned when Lucas made the utterance at issue, does not undermine the conclusion that no factual issue exists as to whether Lucas acted within the outer bounds of his duties. There being no genuine dispute that, at a press conference, Lucas' responses to press inquiries regarding the Center and its employees would constitute part of his employment responsibilities, there can be no question, as a matter of law, that the same responses immediately after a conference's conclusion would at least fall within the outer perimeter of his responsibilities. *See Barr v. Matteo, supra* (statement made at defendant's own initiative, not at press conference or even thereafter).

and deposition (including the attached official job description) compel the conclusion that response to press inquiries is within the official responsibilities of the Center Director. There simply is no genuine factual dispute as to the scope of defendant's duties. Consequently the absolute immunity applied in *Barr* must be granted Lucas to protect him from liability for the alleged defamation.

Cases cited by plaintiff decided since *Barr* do not effectively undermine this conclusion. Although the law relative to an executive official's immunity has developed considerably since 1959, it has not changed the holding of *Barr*, at least as it applies to factual context of this lawsuit. The cases in which government officials have been held subject to liability for violation of plaintiffs' constitutional rights are inapposite. When constitutional rights are threatened, a court could well strike the balance in favor of the plaintiff and require the government official to prove his good faith before he can accept the protection of immunity from suit. Absent constitutional deprivations in the instant case, the need for absolute official immunity is overriding and essential to enable government officials to

> exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties--suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government. [*Barr v. Matteo*, 360 U.S. 564, 571 (1959)].

Several courts, including the United States Supreme Court, have recognized the need to distinguish in this context between constitutional and common law rights, the importance of balancing the need for immunity against the importance of plaintiff's interests, and the availability of absolute immunity in appropriate cases. See e.g., *Scheurer v. Rhodes*, 416 U. S. 232 (1974); *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute*, No. 72-1899 (D.C. Cir. June 28, 1976); *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974).

Nor do the two cited cases which grant only qualified immunity to an official

sued on a nonconstitutional cause of action compel a contrary conclusion. The Second Circuit in *Economou v. United States Department of Agriculture* permitted a former registered futures commission merchant to maintain an action for defamation and wrongful institution of administrative procedures against Agriculture Department officials who were protected by a qualified immunity only. 535 F.2d 688 (CA2 1976). In *Expeditions, supra*, [2] the D. C. Circuit granted only qualified immunity to a department chairman at the federal Museum of Natural History who was sued for libel.

In neither case was the plaintiff a government employee seeking damages from a supervisor for his public comments regarding the employee's job-related conduct. In *Expeditions* the court recognized this difference when it admitted that in *Barr* the plaintiffs' conduct (and publicity about it to the general public as well as within the agency)

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2. The decision was vacated and the case reheard in December, 1976. The opinion upon rehearing has not been issued as of this date.

'directly and severely challenged' the integrity both of the defendant and of the internal operations of the agency which defendant headed, which made essential some action in the nature of that which was taken. The essential character of that single action to all future operations of the agency was found to justify absolute immunity, as a means of eliminating any significant risk that fear would be an immobilizing force. *Expeditions*, *supra*, at 27.

In *Barr* and in the instant case, the risk that plaintiff's action would undermine employee morale and efficiency as well as the public's right to governmental response to criticism, required that the defendant supervisor be able to comment upon those actions without the threat of suit, which might prevent any meaningful or effective response. Because anything less than absolute immunity in these circumstances might adversely affect the performance of governmental duty by stifling a supervisor's response to his own employees' charges and because it would thus threaten the very integrity of the governmental

agency, the court concludes that Bush cannot maintain his defamation claim based on Lucas' July 25, 1975 press statements.

CONSTITUTIONAL CLAIM

Bush also seeks damages for alleged violation of his First Amendment rights of freedom of speech and of petition to Congress[3] resulting from defendant's alleged conspiracy with other persons to institute an adverse personnel action against

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3. Although plaintiff sought to amend his complaint to set forth violations of his fifth and fourth amendment rights, he has not indicated any factual allegations not already in the complaint. None of the alleged events give rise to even a colorable fourth or fifth amendment issue and plaintiff has not offered any theory to explain his reliance on these amendments, so this memorandum of opinion does not deal with them.

plaintiff[4], whereby plaintiff was reduced two General Schedule grades in the civil service. The action allegedly was taken to punish plaintiff for his public criticism of his own job and to prevent future public comments on the same subject.

The claimed right to damages for constitutional violations by a federal official is based on the seminal case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which the Supreme Court held that a damages remedy for an unconstitutional search and seizure could be implied directly from the Constitution. Courts since have permitted maintenance of damage suits for violations of other constitutional rights. *See, e.g., Davis v. Passman,*

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4. To the extent plaintiff may be claiming that his (Bush's) First Amendment rights were violated by Lucas' comments at the press conference, the court disagrees. A person's freedom of speech is not abridged by another's speech in reaction thereto, even if assumed to be defamatory.

No. 75-1691 (CA5 Jan. 3, 1977) (fifth amendment equal protection); *Reeves v. City of Jackson*, 532 F.2d 491, 495 (CA5 1976) (alleged violation of Eighth Amendment and Fourteenth Amendment due process).

Assuming, without deciding, the truth of plaintiff's factual allegations and the existence of a damage remedy for First Amendment violations by a federal official, the court is of the opinion that Bush has not shown a constitutional deprivation for which relief can be granted.

The Supreme Court has set forth a test applicable to Bush's alleged punishment for his public comments:

> The question of whether speech of a [government employee] is constitutionally protected expression necessarily entails striking a balance between the interests of the [government employee], as a citizen, in commenting upon matters of public concern and in the interest of the [government] as an employer in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (*Mt. Healthy Board of Education v. Doyle*, 45 U.S.L.W. 4079, 4082 (Jan. 11, 1977)).

In *Mt. Healthy Board of Education*, the Court accepted the trial court's finding that a communication made by a teacher to the press regarding the school dress code was protected by the First and Fourteenth Amendments. Plaintiff had carried his burden by showing that his communication was a "motivating factor" in the Board's decision to dismiss him and he would prevail upon remand unless the Board could demonstrate that it would have dismissed plaintiff even in the absence of the constitutionally protected conduct.

This court does not reach the issue of causation. Even assuming that Bush's press communication was one, or even the sole, cause for his demotion, it does not necessarily follow, under the Supreme Court's balancing test, that he is constitutionally protected from all adverse personnel actions precipitated thereby. The government's interest in restricting challenges of personnel actions to the administrative remedies outweighs Bush's interest in securing relief beyond the administrative route for his demotion. The government would be harmed more by the maintenance of this action than would the plaintiff by its termination, in view of

the alternative route available to plaintiff for redressing the allegedly wrongful demotion.

The circumstances here stand in contrast to those in *Davis v. Passman*, *supra*, in which the Fifth Circuit denied absolute immunity to Congressman Passman, whose dismissal of his staff member allegedly violated her Fifth Amendment right to equal protection of the laws. Whereas administrative review is available as a means of overturning wrongful demotions or dismissals of civil service employees such as Bush[5], no

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5. As already indicated, Bush appealed his demotion and the appeal was heard and the demotion sustained by the Civil Service Commission. Although Bush had the further opportunity to appeal from the Commission to the United States District Court, it does not appear that he did so. The court is not now undertaking any review of the Civil Service Commission's decision, but is simply noting that the demotion, if truly wrongful, was not without redress and plaintiff has had his day in court in another forum to prove the facts he now alleges, while seeking there, admittedly, relief from the government rather than from Lucas personally.

such relief was available to the *Passman* plaintiff. Reinstatement was not realistic there because plaintiff's former job would disappear with defendant's Congressional tenure, which expired the same month of the court's decision. Moreover, the court expressed reluctance to order reinstatement of a representative's personal assistant. Conversely, reinstatement of plaintiff herein to his former position by the Civil Service Commission was a possible solution and would have been an effective remedy since his former duties did not require a close working relationship with the defendant.

In view of plaintiff's administrative review opportunities and the importance of the government's interests in promoting the efficiency and integrity of its public services through its employees, the Court concludes that Bush's public statements about his duties do not rise to the level of constitutional protection such that he can maintain an action in damages based on his demotion, allegedly contrived as a punishment for those statements.

There being no genuine issue as to any material fact, defendant is entitled to prevail as a matter of law. Summary

judgment is due to be granted and will be entered by separate order.

This the 4th day of February, 1977.

s/ Sam C. Pointer, Jr.
United States District Judge

APPENDIX C

UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY
ATLANTA FIELD OFFICE
ATLANTA, GEORGIA 30309

APPEAL OF MR. WILLIAM C. BUSH
UNDER PART 752, SUBPART B, OF THE
CIVIL SERVICE REGULATIONS
DECISION NUMBER AT752B60394
DECIDED ON AUGUST 12, 1976

I. INTRODUCTION

By letter received in the Atlanta Field Office on December 17, 1975, as supplemented, the above-referenced appellant submitted an appeal from an adverse decision by the Director, George C. Marshall Space Flight Center, Huntsville, Alabama, (hereinafter referred to as MSFC), to effect his change to lower grade on November 30, 1975, from the position of Supervisory Aerospace Engineer, GS-14, $34,916 per annum, to Aerospace Engineer, GS-12, $25,200 per annum, MSFC. The adverse action was based on charges of making certain

public statements, which produced allegedly unfavorable reaction.

It has been established that this appeal comes within the purview of Subpart B, Part 752 of the Civil Service Regulations and that it was timely filed. Accordingly, it has been accepted for adjudication.

The appellant requested a hearing open to the press and public, and such hearing was held by a representative of the Federal Employee Appeals Authority at Huntsville, Alabama, on June 8, 9, and 10, 1976. A verbatim transcript of the hearing is a part of the permanent record in this case.

II. BACKGROUND

The record reveals that MSFC, and particularly, the Directorate of Science and Engineering (SE), became involved in a major reorganization and a concurrent reduction in force, effected on June 11, 1974, because of reduced funds and a change in mission. On that date, the appellant was

reassigned from Position No. 18627, Aerospace Engineer, AST, Flight Structures, GS-14, Systems Products Office, SE, to Position No. 17610 (same title, series and grade), Auxiliary Equipment Branch, Structures Division, Structures and Propulsion Laboratory, SE. The appellant submitted an appeal to the Civil Service Commission alleging that the reassignment was a reduction in rank and, at the same time, appealed the classification of Position No. 17610. Before a final decision was issued on these appeals, an evaluation by the agency revealed that the correct grade level of Position No. 17610 was GS-13. When the appellant was reassigned, on November 10, 1974, to Position No. 19343-S, Supervisory Aerospace Engineer, AST, Flight Structures, GS-14, in the Auxiliary Equipment Branch, the Civil Service Commission terminated his classification appeal regarding Position No. 17610 on the basis that the appellant no longer occupied that position.

On February 28, 1975, the Commission's Appeals Review Board issued a decision which sustained the reduction-in-rank appeal and recommended the cancellation of the June 11, 1974, reassignment to Position No. 17610. Thereafter, the agency cancelled the reassignment and amended its records to show the appellant's reassignment from Position No. 18627 to Position No. 19343-S, effective on November 10, 1974.

The appellant filed a classification appeal to the Commission regarding Position No. 19343-S and also appealed to the Federal Employee Appeals Authority, alleging that this reassignment was a reduction in rank. Subsequently, he chose to pursue the reduction-in-rank issue concurrently with an age discrimination complaint through the agency's discrimination complaint procedures.

In mid March 1975, SE experienced another reorganization smaller than the one undertaken in June 1974. It was after the second reorganization that the public remarks attributed to the appellant,

on which the instant adverse action was based, were published.

On July 31, 1975, the Atlanta Regional Office of the Civil Service Commission issued its decision regarding the classification appeal, finding that Position No. 19343-S was properly classified as Supervisory Aerospace Engineer, GS-14. The classification decision is discussed in further detail later in this decision. The discrimination complaint, including the issue of reduction in rank, has not been decided as of the date of this decision.

III. ANALYSIS AND FINDINGS

A. PROCEDURES

Evidence in the record discloses that a written notice dated August 1, 1975, informed the appellant of the reasons for proposing his removal; told him where he might review the material relied on in proposing the action; and advised him of the time limit (15 days, later

extended) within which he might answer the charges both personally and in writing. The record further discloses that, after the appellant submitted written answers dated September 17 and 18, 1975, and made an oral reply on October 6, 1975, he was notified of the decision to effect his change to lower grade, from GS-14 to GS-12, on the basis of the aforementioned charges. The notice of decision, signed by an official at a higher level than the official who proposed the action, was delivered to the appellant prior to its effective date.

The record shows that the appellant was retained in an active duty status at the higher grade during the notice period, although he was detailed to another position.

Section 752.202(a) (1) of the Civil Service Regulations provides, in pertinent part, that an employee against whom adverse action is sought is entitled to at least thirty (30) full days' written notice stating any and all reasons,

specifically and in detail, for the proposed action (emphasis added).

The advance notice in this case reads, in part, as follows:

Charge No. 2

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(Unnumbered paragraph 5, page 11) The above specifically described conduct has created an environment which has adversely affected this Agency and in particular the George C. Marshall Space Flight Center. Aside from the disrepute you have brought to this Agency and its Management and aside from the loss of public confidence you have caused, your conduct has undermined morale at the George C. Marshall Space Flight Center and brought disharmony and disaffection among fellow employees. (emphasis added)

(b) Mr. Alred P. Warren, team leader in the Auxiliary Equipment Branch, in a statement

to the NASA Regional Inspector made "reference to the first appearance on local TV by Mr. Bush, commenting that it upset many people because it was distorted." "I was very disturbed about it, he stated, as the program on TV showed Bush sitting at his desk with no papers in sight, he had no telephone, and his briefcase was sitting on a wastebasket. This was distortion, he said."

Mr. Warren further is reported as saying:

"This situation surrounding Bush at MSFC, and the adverse newspaper publicity, which is not confined to the Huntsville area, has adversely affected the morale of the entire branch. The TV interviews on site have disrupted the work process, it has become a topic of conversation and has created a disruption of service efficiency."

(c) Mr. Carl Loy, Auxiliary Equipment Branch, stated to the NASA Regional Inspector that Mr. Bush had discussed the articles which appeared in

newspapers in the presence of Mr. Loy and others in the office. Mr. Bush has told him that his job is a farce.

(e) Mr. Harry Thayer, Auxiliary Equipment Branch, stated to the NASA Regional Inspector that Mr. Bush spends a lot of time on the telephone discussing his desire to leave the organization and attend law school. Mr. Bush discusses the belief he has been demoted and if his job were abolished, he could retire. "I do not believe anyone should be able to have their job abolished to gain a personal benefit."

(f) Mr. Leonard Moore, Auxiliary Equipment Branch, stated to the NASA Regional Inspector: "He wants his job abolished, he has said, so he could go to law school."

Mr. Moore says he believes Mr. Bush's position is needed and is not a falsehood. Mr. Moore further states that he left the room when the TV people came to interview Bush. "I did not approve of

such a thing so I left. I think this should have been done another way it if needed to be done at all. Mr. Bush should settle his gripes with Management, if he has any."

(g) You did write a letter to the Editor of the Federal Times, November 4, 1974, encouraging other Government employees to dissent and to file appeals and civil suits against the Government. The letter was not only degrading to the appellate process, but was punctuated with inflammatory statements and words such as "FIGHT."

The notice of decision informed the appellant that only those reasons set forth in the decision letter were found sustained and that all other reasons specified in the advance notice were not sustained. Omitted from the decision letter was that part of Charge No. 2 which appears above the first sentence, quoted above. Thus, there is no "specifically described conduct" upon which to

base the conclusion stated in the notice and quoted earlier (underscored portion).

With respect to the remainder of Charge No. 2, beginning with paragraph (b) we find that the advance notice is procedurally defective. Specifically, with respect to the statements referred to in paragraph (b) through (f), the advance notice fails to provide the appellant such information as when the statements were made, the circumstances under which they were made, to whom they were made, and the context in which they were made. Also, the statements which merely quote comments of the appellant do not support the charge that morale has been undermined or that the appellant brought disharmony and disaffection among fellow employees. Further, the remaining statements are no more than conclusions, and do not, in themselves, support the charge of bringing disharmony and disaffection among fellow employees.

As for the letter cited in paragraph (g), even if the facts asserted are assumed to be true, they are insufficient to support the charge.

Based on the foregoing, we conclude that Charge No. 2 of the advance notice is fatally procedurally defective. Accordingly, no further consideration will be given to this charge.

With respect to Charge No. 1, the notice of decision reads, in part, as follows:

> 1. You did on more than one occasion publicly make remarks which were misleading and often false . . .

While the advance notice specifically identifies those statements which are considered false, the notice of decision makes no finding with respect to the falsity of the statements, except in the general terms quoted above. Since the decision letter contains no findings with respect to which of the statements the agency considered to be

false, we have considered the charges found sustained by the agency only in the light of whether the evidence supports a conclusion that such statements were misleading.

The appellant contends, in effect, that the entire action is defective because the decision letter makes no finding that the demotion will promote the efficiency of the service. However, there is no requirement that an agency include such a statement in the decision letter.

The appellant further contends that the deciding official, Mr. William R. Lucas, Director, MSFC, had prejudged his case and failed to give sufficient consideration to the appellant's written and oral replies. In this respect, he referred to a statement made by Mr. Lucas during an interview with a local television reporter that, "Mr. Bush has made certain statements to the effect that he does not have meaningful work to do. I have had that statement investigated and I can say unequivocally that such a statement has no basis

in fact." The statement was televised sometime after June 25, 1976.

The record shows that the charges are not limited to public statements relating to whether the appellant had meaningful work to do, but include charges as to other public statements, as well as charges with respect to the appellant's intentions in making such statements. Thus, the fact that Mr. Lucas considered one of the statements to be without basis does not support a conclusion that he had prejudged the case. Furthermore, the record discloses that after the appellant's written and oral replies were received, Mr. Lucas found some of the charges not sustained and also reduced the proposed penalty from separation to a two-grade demotion. In these circumstances, we find that Mr. Lucas did not prejudge the appellant's case.

The appellant also contends that he was not afforded a meaningful opportunity to answer personally to the charges, in that the oral reply

officer did not participate in any discussion with him. In support of his contention, he cited Ricucci v. United States, 425 F.2d 1252 (Ct.Cl. 1970).

The agency representative pointed out that essentially the same contention as raised by the appellant was rejected by the court in Grover v. United States, 200 Ct.Cl.337 (1973).

Section 752.202(b) of the Civil Service Regulations provides, in pertinent part, that, "The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made."

In the instant case, the evidence shows that the oral reply officer named in the advance notice is Mr. J. E. Kingsbury, Director, SE, who also proposed the adverse action. The oral reply session was attended by the appellant's representative,

the appellant, Mr. Kingsbury, and the deciding official, Mr. William R. Lucas. A transcript of the oral reply session does not reflect that either Mr. Lucas or Mr. Kingsbury engaged in any discussion with the appellant during his presentation of the oral reply, although several off-the-record discussions are noted. The transcript reflects that the appellant was informed at the outset that no questions would be asked or answered.

In Grover, the court held that an effective oral reply does not necessarily require a dialogue between the oral reply officer and the employee if the officer is in the direct line of management authority superior to the employee and is authorized to make a final recommendation. In the case at hand, Mr. Kingsbury satisfied that requirement. Furthermore, the deciding official was present during this session and was provided with a verbatim transcript of the response. On these facts, we find no impropriety with respect

to the personal reply procedures followed in this appellant's case. Moreover, the Commission's regulations do not preclude the official who proposed the action from serving as the official designated to receive the appellant's written and oral answers.

Without further specifying, the appellant further contends that the deciding official actually punished the appellant for certain charges which he found not sustained (written statements to members of Congress). In this respect, the notice of decision sets forth clearly those charges found sustained and states, "All other reasons specified in the Notice of Proposed Removal are not sustained and were not considered in reaching the final decision." Our examination of the record disclosed no evidence to the contrary; therefore, we find no procedural irregularity with respect to this matter.

The appellant also raised an issue that the agency failed to follow its regulations governing the development of evidence of all pertinent facts.

Presumably, these contentions relate to agency regulations governing pre-action investigations. In this respect, the Commission, upon appeal, will consider allegations that an agency did not follow its own procedural regulations governing adverse actions; however, the review is limited to regulations which afford the employee against whom adverse action is being effected procedural safeguards in addition to those provided by Part 752 of the Civil Service Regulations. We do not review regulations relating to pre-action investigations.

In light of the foregoing, and after a careful review of the record, we find that the procedures followed in effecting the adverse action in this appellant's case complied with the Civil Service Regulations.

B. MERITS - SUFFICIENCY OF THE REASONS

Charge No. 1 of the demotion action has three specifications. The first specification to charge

one accuses the appellant of publicly making misleading remarks which generated an environment of sensationalism demeaning to the Government, NASA, and personnel of MSFC, thereby impeding Government efficiency and economy and adversely affecting public confidence in the Government Service.

The statements attributed to the appellant are contained in an article dated May 15, 1975, which appeared in the Huntsville Times, and served as the basis for a May 17, 1975, national press release published in the Seattle Post-Intelligencer, Birmingham Post-Herald, Washington Star, and Buffalo Evening News; in a letter dated June 6, 1975, to a reporter for the Washington Post; and in a National Enquirer article on July 29, 1975. The record includes documentation of the remarks attributed to the appellant, including copies of the news articles referred to and a copy of the letter dated June 6, 1975.

The appellant does not take issue with the substance of the remarks. Rather, he claims

that, while the remarks reflect hyperbole and exaggeration, they do have a basis in fact. He contends that, since he was unsuccessful in his attempts to get the agency to abolish what he believed to be a useless job and to place him in a more productive job, or in the alternative to abolish his job and allow him to retire, he was justified in bringing this matter to public attention through the news media. On the other hand, the agency argues that the remarks are misleading, and were made by the appellant for the purpose of getting his job abolished, thereby permitting him to receive early retirement. The agency's contention that the remarks were designed by the appellant to assist him in getting his job abolished constitute the basis for one of the specifications to the first charge and will be discussed later in this decision.

The substance of the statements charged in the first specification is that the appellant's position (No. 19343-S) was written improperly

"to support the GS-15 Branch Chief" and was a "falsehood, a travesty and worthless"; that he was not the only one who had a grossly inaccurate job description; that he had not been told who to supervise and did not know what their jobs were; that his job was worthless and no one seemed to care; that his complaints about his job were unsuccessful; and that management told him, in effect, to keep his mouth shut. Also, the appellant is attributed with having made statements to the effect that personal records had been removed from his desk; that he had been placed in charge of housekeeping for his group; that he had no telephone for eleven months; and that MSFC had lost its design and analysis capability and had become a contract-monitoring entity.

There is a mass of evidence, both documentary and testimonial, in the record with respect to the appellant's position. It was the subject of a classification appeal filed by the appellant, in which he made some of the statements subsequently

attributed to him in the news articles. The appellant contends that Mr. Frank Colvin, a Civil Service Commission Classification Specialist of the Atlanta Regional Office, who conducted a desk audit of the position in connection with his appeal, commented in the presence of Mr. Charles Faulkner, the appellant's immediate supervisor, that the appellant's statements regarding his job were true. Mr. Colvin is also said to have questioned why Mr. Faulkner had certified that the position description was accurate when, in fact, that was not the case.

We find, however, that the classification appeal decision, issued by classification experts of the Civil Service Commission with final classification authority, is dispositive of the issue concerning the validity of the appellant's position. The decision also reflects the facts obtained by Mr. Colvin during the on-site audit referred to by the appellant. It reads, in pertinent part, as follows:

Our examination of your case has confirmed several of the allegations made in your appeal. It is apparent, for example, that from November 10, 1974 (when you were assigned to this position), until March 16, 1975, the organizational structure necessary to provide you with employees to supervise had not been officially implemented. It also appears that, until as late as April 21, 1975, the employees whom you were to supervise may not have been officially identified to you (emphasis added). That is to say, there is a record that your supervisor had a meeting with you on that date, in response to the appeal you had just filed, for the express purpose of officially explaining your assigned duties and responsibilities, including identifying your subordinates to you and you to them. At the time of our on-site audit (July 14, 1975), personnel records revealed that one GS-13 employee presumably under your supervision

had not yet officially been assigned to your branch (a request for official personnel action to accomplish that assignment, however, was then being processed).

After an analysis of the duties and responsibilities of the position, as set forth in the official position description, the classification evaluation concluded:

> On the basis of this evaluation, we have determined that your position (number 19343-S) is properly classified as Supervisory Aerospace Engineer, GS-861-14. Continued justification of that grade, however, depends on the realization of a projected responsibility for technical supervision of a minimum of two GS-13 positions (including either Mr. Loy's or an additional GS-13 position). We are therefore directing your agency to audit and report to us on that aspect of your position six months after the date of this

decision.

The agency furnished documentary evidence of its compliance with the audit and report requirements.

Although the appellant initially stated that he did not know who his subordinates were at the time he made the remarks attributed to him in the advance notice, he subsequently acknowledged that he saw an organizational chart on Mr. Loy's desk in February, 1975, which described the organization to become effective on March 17, 1975, and called for him to be the supervisor of five people identified on that chart. Also, the appellant admitted in the classification appeal letter that he had learned the second week of March 1975, who his subordinates were.

The record includes extensive testimony from the appellant, his fellow employees and his supervisors as to the amount of work actually performed by the appellant while serving in the position. The question, however, is not what work the appellant

did, but what was specified in the position description and what was available for him to do. The appellant acknowledged that he never informed Mr. Charles Faulkner, his supervisor, from March 1975, that he did not know who he was to supervise or that he had insufficient work to do. Mr. J. O. Lysaght, the appellant's immediate supervisor until March 1975, stated that there was plenty of work for the appellant to do and that the appellant did not tell him that he did not have enough productive work to do or that his position was worthless (T.86-92). Furthermore, Mr. Gustav Kroll, the appellant's second level supervisor, stated that the appellant did not come to him with any dissatisfaction about his job (T.140).

We conclude that the evidence clearly shows that the appellant's position was not false or worthless. Further, the evidence, as discussed above, shows that at the time of his interviews with reporters from the Huntsville Times and the National Enquirer, the appellant did not have a

grossly inaccurate position description. And, while the evidence shows that a number of positions established in the June 1974, reorganization were classified one grade higher than could be supported by the agency, that alone does not support a conclusion that these position descriptions were grossly inaccurate. Moreover, the testimony of the appellant and his fellow employees, Mr. Robert Louis (sic), Mr. Leonard Householder, and Mr. Jerry Cox, do not support the appellant's statement regarding other grossly inaccurate position descriptions. Their testimony reveals that some employees were dissatisfied with the assignment given them in the reorganization; not because of grossly inaccurate position descriptions, but because they were placed in positions they believed to be inconsistent with their background and training. However, the evidence establishes that in the reorganization and retrenchment of June 1974 employees received assignments that were available in the new organization.

There is no evidence in the record on which to base a conclusion that anyone in management told the appellant to keep his mouth shut or used words to convey a message to that effect to him, despite the appellant's contention that Mr. Adrian Clark did so. Mr. Clark is said to have told the appellant that Clark's supervisor threatened to take Clark's supervisory position from him.

A careful review of the record fails to disclose any evidence that the appellant's statement concerning removal of personal records from his desk is misleading. The testimony of Mr. Harry Thayer, a former subordinate of the appellant, that the appellant "kept his file locked" (T.568), is inadequate to support such a conclusion. The same is true of the testimony of the appellant's superiors, Messrs. Kroll and McCool, that the appellant never reported the matter to them (T.141,187). No other evidence was presented.

As for the statements attributed to him concerning housekeeping, the appellant claimed to have said,

"I am alternate housekeeper for Room 4035," rather than the statement he is charged with having made (Written Reply, 9). The record does show that this assignment carried with it responsibilities for safety and security, but did not include custodial duties (T.90,186). Moreover, Mr. Robert E. Garrett, who succeeded the appellant in Position No. 19343-S, said that he had performed so-called housekeeping functions involving safety and security after he took the position (T.214-215). The appellant argued that the remarks he made did not imply that he was expected to perform custodial duties. Nevertheless, the tenor of the appellant's comment and the context in which it was made, leads us to the conclusion that the appellant was attempting to depict himself as a custodian, and that he tailored his statement accordingly.

In his oral reply (Page 8), the appellant reiterated that he did not, in fact, have a telephone for eleven months. In this regard, the record shows that there were three telephones in

the room where his desk was located; that he did not request a telephone or mention his lack of one; that it was normal practice for a supervisory employee to initiate requests for telephones; and that the appellant did not do so (T.91,140,185,692). Mr. Garrett testified that when he took the job, he submitted a request and got a telephone installed (T.213).

The advance notice and the notice of decision reflect that the appellant's statement regarding loss of design and analysis capability was made in a letter to a reporter of the Washington Post, and there is no evidence that it received further publication. The appellant stated that he asked that the letter not be published. Accordingly, we find no impropriety with respect to this matter.

After an exhaustive examination of the evidence and careful consideration of the circumstances surrounding the interviews which produced the statements at issue in this case, we hold that the tenor of the appellant's statements, the language

used, the context in which they were made, the publications in which they appeared, and the national notoriety they received, support a finding that, with the exceptions discussed more fully earlier in this analysis, the statements were mis-leading; that they generated an environment of sensationalism demeaning to the government, the agency, and its personnel at MSFC, and that they impeded government efficiency and economy and adversely affected public confidence in the government service.

The second specification of the first charge concerns letters written by citizens throughout the nation in response to newspaper articles reporting the appellant's comments to a reporter of the Huntsville Times. The agency charges that the letters are proof that the appellant's published comments have generated disrespect and loss of confidence for government service and loss of confidence in NASA. One letter, dated June 11, 1975, is quoted, as follows:

> In reading this article I only confirm my thoughts that it is the flagrant spending of Congress that is causing such inflation and imbalance of our economy. *** I find it very hard to place any trust in our government, when in time of peace that they (sic) cannot operate on a balanced budget.

Another reference is to a letter from a resident of Decatur, Alabama, said to commend the appellant for taking the actions referred to in an article appearing in the Birmingham Post-Herald, and to the appellant's response to that letter. The appellant's response is quoted as stating that he is "...appalled at the illegalities that are rampant on the Arsenal" and "(I) predict the scenario will be a repeat of a page from Watergate - STONEWALL IT." The appellant is said to admit to the disharmony he had created among fellow workers by stating that "some of my fellow employees have threatened to tar and feather me."

The specification also cites three letters said to indicate that the appellant's comments had created among the public an absolute belief that the Government would save thousands of dollars per year if Position No. 19343-S were abolished.

Copies of the letters cited in the specification are a part of the record in this case and the appellant acknowledged that the letters were written in response to published comments he had made to the Huntsville Times reporter. The appellant stated that the illegalities referred to in his letter concerned violations of laws and regulations governing Government personnel and that the term "Stonewalling" was appropriate, as it meant, "burying the facts." He contended that the writers' motives were not reflected in the quoted parts of the letters in response to his public statements; and that the letters cited as indicating absolute belief that the government would save money did not reflect such belief. The appellant pointed out that, in two instances, the

letters were actually soliciting money from him.

One of these letters, from Glen Rock, Pennsylvania, states:

> I honor you for saying you get too much money. I don't think anyone is worth that much money but if I were you I would take it and distribute it to people that need it. God will bless you.

Another of the letters begins, "Well, Praises Be! we've found an honest man!" The third letter, from a retired Lieutenant Colonel, praises the appellant for his action as does the letter to which the appellant responded, as quoted in the specification.

The content of the letters cited in the second specification clearly indicates that the writers were responding to the appellant's statements reported in the media. Furthermore, an examination of the letters discloses that the writers believed the appellant's statements. In view of

these facts, and in view of the nature of the appellant's comments, we hold that belief in the appellant's comments, as manifested in the letters cited, reflects that the appellant's statements did generate disrespect for and loss of confidence in the Government and NASA.

The third specification accuses the appellant of making statements which appeared to the general public to be honorable and motivated by public interest, but which were actually motivated by the appellant's desire to have his position abolished for the personal benefit of being able to take early retirement and enter law school. The agency charges that the appellant's statements (e.g., "All I want is viable employment") misled the public, causing unwarranted criticism of NASA. This specification cites memoranda of March 18 and 25, 1975, from the appellant to Mr. C. H. Shelton with respect to the abolishment of the appellant's position and his interest in entering law school; a letter to the appellant dated December 10, 1974,

accepting his application for admission to law school beginning August 26, 1975; and conversations with the Structures and Propulsion Laboratory Director and the MSFC Retirement Coordinator regarding retirement.

The facts set forth in the specification are documented. The appellant acknowledged that he sought to have his position abolished, but that law school was only one of the alternatives which he considered. He said that the idea of serving less than 30 years never crossed his mind until August 1974, (Written Answer,16) and that, although there was a period of eligibility for discontinued service retirement which ended in late February 1975, he did not become eligible for retirement until February 11, 1975, and was not sure then that he was eligible.

As noted earlier, the record shows that the appellant was assigned to a valid position and that there was work available for him to perform.

Given these facts, and the appellant's expressed frustration in resolving his alleged grievances with the agency, a reasonable inference is that his statements were motivated by self-interest, rather than an altruistic interest in the economy and efficiency of the service.

In summary, the preponderance of the evidence supports a finding that the three specifications to Charge No. 1 are sustained.

Finally, the appellant asserted that the agency's action was an encroachment on his constitutionally protected right to freedom of speech. In this regard, he acknowledged that government employees do not have unlimited freedom to make public remarks critical of the agencies that employ them. Nevertheless, he maintained that his statements were entitled to first amendment protection because they addressed matters of legitimate public concern, and because the agency has failed to prove malice on his part. The appellant also pointed out that no one in a position of authority

with the agency notified him not to communicate with the press and general public.

Both the appellant and the agency submitted extensive briefs concerning the alleged infringement of the appellant's first amendment rights. The briefs submitted by the parties, which set forth legal authority and argument, have been considered in reaching the decision in this case.

After a thorough analysis of applicable legal authority, and after an exhaustive examination of the entire record, we conclude that the appellant's public remarks exceeded the bounds of expression protected by the first amendment. Our conclusion in this respect is based on three crucial factors. First, the appellant's statements stemmed, not from public interest, but from his desire to have his position abolished. Second, the statements were misleading; they conveyed the erroneous impression that the agency was deliberately wasting public funds, thus discrediting the agency and its employees. Third, there was no legitimate

public interest to be served by abolishing the appellant's position. The record shows that the duties of his position remained to be performed, regardless of whether the appellant's position was in existence or not. For this reason, abolishment of the appellant's position would have produced no savings to the government.

Clearly, the law affords federal employees first amendment protection so that they can be free to take what they believe to be appropriate measures to safeguard the interest of the public they serve. Nevertheless, as happened in the present case, when an employee makes unwarranted public remarks critical of his agency for reasons of self-interest, such protection is no longer available to him.

As for the appellant's claim that he was never instructed not to communicate with the press or public, we note that the agency's concern in this case was with the substance of the appellant's interviews, not with the fact that he granted

interviews. Furthermore, it was the responsibility of the appellant, not the agency, to exercise prudent judgment to determine whether the comments were proper and within the protection of the first amendment.

The notice of decision informed the appellant that he would not be entitled to salary retention under Part 531 of the Civil Service Regulations. The appellant contends that salary retention is appropriate in his case. Subpart E, Part 531 of the Civil Service Regulations governs salary retention for general schedule employees who are demoted from one general schedule grade to another. Section 531.502 sets forth the mandatory requirements for eligibility for salary retention. One such requirement is that the demotion may not be for personal cause. As pointed out in Subchapter 5, Chapter 531 of the Federal Personnel Manual, personal cause includes demotions based on the conduct of the employee. Accordingly, we find that the appellant was demoted for personal cause

and, therefore, is not entitled to salary retention.

IV. CONCLUSION

Evidence in the record, as discussed above, sustains the three specifications to Charge No. 1.

As explained more fully in the body of the decision, Charge No. 2 was found to be procedurally defective.

In our view, the sustained charge is sufficient to warrant the penalty imposed in this appellant's case. An exhaustive review of the record fails to reveal evidence of circumstances in mitigation or extenuation sufficient to warrant a conclusion that the penalty imposed is arbitrary, unreasonable, or capricious; hence, we find that the removal [sic] action is for such cause as will promote the efficiency of the service. In reaching this conclusion, careful consideration was given to the agency's regulations governing

discipline, and particularly Section 7.404 dealing with penalties to be imposed on an employee. We find that the action taken in this case is in accord with the standard established in the section cited.

V. DECISION

The change-to-lower-grade action is affirmed.

Civil Service Regulation 772.309(b) provides that decisions of the Federal Employee Appeals Authority are final and that there is no further right of administrative appeal.

For the Commission:

IRA R. HARRISON
Appeals Officer

APPENDIX D

UNITED STATES CIVIL SERVICE COMMISSION

APPEALS REVIEW BOARD

WASHINGTON, D.C., 20415

In Reply Please Refer to
ARB:clw
July 14, 1978

Mr. Harvey Elrod
Huston, Elrod, Edwards & Belser
P.O. Box 632
Decatur, Alabama 35601

BEFORE: Member Cohen -- Reverse
Member Palmquist -- Reverse
Member Tillman -- Reverse
By Unanimous Decision -- Reverse

Dear Mr. Elrod:

This is in further response to your request that the Board reopen and reconsider the August 12, 1976 decision of the Atlanta Field Office, Federal Employee Appeals Authority (FEAA), in the matter of William C. Bush (the appellant), which affirmed the action of the National Aeronautics and Space Administration (NASA) in demoting him

from the position of Supervisory Aerospace Engineer, GS-14, to Aerospace Engineer, GS-12, at the Marshall Space Flight Center (MSFC), Alabama, effective November 30, 1975. By decision of March 10, 1978, the Board granted your request and reopened the case. Thereafter, a copy of the material submitted in support of the request was transmitted to the agency, and a copy of its response of April 27, 1978, has been submitted to you. This is the Board's decision on reconsideration of the case.

The record shows that appellant's removal was proposed by the Director, Science and Engineering, MSFC, on August 1, 1975, on the basis of two charges. Charge 1 reads as follows:

1. You did on more than one occasion publicly make intemperate remarks which were misleading and often false, evidencing a malicious attitude towards Management and generating an environment of sensationalism demeaning to the

Government, the National Aeronautics and Space Administration and the personnel of the George C. Marshall Space Flight Center, thereby impeding Government efficiency and economy and adversely affecting public confidence in the Government service, to wit:

There followed eight pages of specifications detailing appellant's statements and conduct. In addition, the advance notice contained a second charge, but portions of it were not relied on by the final agency decision and the remainder was found to be procedurally improper by the Field Office, so the entire charge is no longer relevent to the Board's reconsideration of this case. After submitting written and oral responses, appellant was informed by letter of November 25, 1975, of those portions of the advance notice which were found sustained by the agency decision. The decision, issued by the Director, MSFC, found that, although the sustained reasons were

sufficient to warrant his removal, because of the fact that this was appellant's first offense, it had been decided to reduce the penalty to the demotion referenced above.

Appellant submitted an appeal to the Atlanta Field Office and on June 8, 9, and 10, 1976, a hearing was held at his request. In its decision of August 12, 1976, the Field Office found, as noted above, that charge 2 was procedurally defective. It also found that the agency had made no specific findings as to the allegation that appellant's statements were false, so that the charge would only be examined insofar as it alleged that they were misleading; that the allegations of procedural error, concerning the propriety of the oral reply and the deciding official's involvement in the case, were not sustained; that the contentions relative to the agency's investigation of the matter would not be examined because the investigation pre-dated the initiation of the adverse action; that, with the exception of a few points, specification 1 of

charge 1, the charge that appellant made misleading remarks which were demeaning to the agency and thereby impeded Government efficiency and adversely affected public confidence in the Government service, was sustained; that specification 2, alleging the loss of confidence and respect caused by appellant's remarks, as shown by letters written by citizens throughout the nation, was sustained; and that specification 3, that appellant made statements which appeared to be honorable, but were actually motivated by self-interest, was sustained. On the basis of the three sustained specifications, the Field Office concluded that the charge was sustained. It is also determined that the statements cited in the charge exceeded the bounds of protection afforded by the First Amendment because they stemmed from appellant's desire to have his position abolished, rather than from the public interest; because they were misleading; and because there was no legitimate public interest to be served by having appellant's position abolished. On the basis of these

findings, the Field Office concluded that the demotion was taken for such cause as would promote the efficiency of the service and it was affirmed.

You submitted a request for reopening of the Field Office decision on November 7, 1977, which enclosed five exhibits which you contend constitute new and material evidence. The bulk of the submission was an extensive exposition of your contention that the Field Office decision involved numerous misinterpretation of law, concerning Fifth Amendment due process rights and freedom of speech guaranteed by the First Amendment, and would serve to set an improper precedent with respect to these issues. The agency's April 27, 1978 response contains its representations in opposition to each of your major contentions and in support of the conclusions reached by the Field Office.

The five exhibits attached to the request for reopening are NASA Policy Directive 1380.4, dated December 27, 1968, the decision of the U.S. District Court in the case of Lodge 1858, American

Federation of Government Employees v. NASA, two Comptroller General reports, dated January 16, 1976, and May 4, 1977, and NASA Instruction 1130.8 of January 16, 1969. The Board finds that none of these submissions constitutes new and material evidence which was not readily available prior to the issuance of the Field Office decision. The agency issuances and one of the Comptroller General reports, as seen by their dates, were available at earlier dates. Further, we find that none of the exhibits is relevant to the matters before the Board. First, the District Court decision was reversed on appeal by the U.S. Court of Appeals, District of Columbia Circuit on March 20, 1978. Policy Directive 1380.4 adds nothing to the case because it provides only for the "appropriate" dissemination of information and does not set a policy which would determine the outcome of a case such as this. In addition, we find that the Comptroller General reports contain no evidence relating to the specific issues of the case, especially since the charge based on appellant's

statement that MSFC had become a contract monitoring organization, is not one which still remains for decision. Finally, in addition to its age, Instruction 1130.8 does not meet the requisite criterion because it concerns the matter of the pre-action investigation of the case and, for the reasons set forth in the Field Office decision, is not relevant to the matters before the Civil Service Commission. Therefore, the Board will give no further consideration to these exhibits.

With respect to the charge that the Field Office decision violated appellant's due process rights afforded by the Fifth Amendment, the arguments in this regard concern the adequacy of the oral reply to the notice of proposed adverse action, the alleged prejudice of the deciding official, the denial of the request for the appearance of certain witnesses at the FEAA hearing, the alleged improper application of a standard of proof by the Appeals Officer, and the alleged personal bias of the Appeals Officer.

You contend that the oral reply was unfair because the official to whom appellant responded did not provide a dialogue on the issues raised in the response, and that, under the standards set by the Court of Claims in the case of Ricucci v. United States, 425 F.2d 1252 (1970), this provided him with an incomplete opportunity to refute the charges. Based upon our review of the evidence bearing on this matter, while we find merit to the contention concerning Ricucci, we concur in the Field Office's ultimate finding, because we agree that the Court of Claims set clear limits on the Ricucci rationale in deciding Grover v. United States, 200 Ct. Cl. 337 (1973), and that the oral reply afforded appellant in this case comports with the requirements set forth in the latter decision. Accordingly, for the reasons stated by the Field Office, we find no violation of appellant's right to due process in this particular.

The argument concerning the deciding official is that he did not give fair consideration to the charges and appellant's response thereto, because he had already made a public statement that appellant's statements had been investigated and found to be untrue. In this regard, the Board finds that the official's statement concerned only one of the statements referenced in the letter of charges and we note that the Field Office confirmed the official's statement by finding that the statement by appellant, to which the response referred, was misleading. Further, we do not believe that all prior involvement by an agency official in the normal course of his/her duties disqualifies him/her from serving as a deciding official when an adverse action is proposed. The determinative factor is whether or not, irrespective of his/her prior familiarity with the case, the official gave full and fair consideration to the charges and the employee's response. In the instant case, the official found certain portions of the charges sustained and exercised his discretion by effecting

a change to lower grade, rather than the proposed removal action, as the proper penalty. Under the circumstances of this case, we concur in the Appeals Officer's determination that the record does not support the allegation that appellant was denied his right to due process in this regard.

The third of these issues is that the Appeals Officer improperly denied appellant's request for the appearance of certain witnesses who were employees of the agency. The Board finds that insofar as the requests concerned those persons involved with the investigation of the charges which led to the adverse action, the Appeals Officer properly found that the testimony of such witnesses was irrelevant to the case. The adverse action must be judged by the evidence adduced concerning its merits, and an employee must be given the opportunity to confront and cross-examine his "accusers," as we find was done in this case. We find that the Appeals

Officer's actions in this regard were in accordance with the requirements of section 772.307 of the Civil Service Regulations, and specifically, the direction in subsection (c)(3) thereof to "exclude irrelevant or unduly repetitious testimony."

Your fourth contention is that the Appeals Officer applied an improper standard by concluding that the adverse action could be sustained on the basis of a finding that it was supported by a preponderance of the evidence. The Board finds no error in this regard. We have reviewed the case you cite in support of this contention and note that it found such a standard appropriate, in large part, because the case involved the issue of fraud. Such an issue is not involved in the instant case. Further, Civil Service Commission policy requires application of the standard applied by the FEAA, and this standard has been judicially approved in numerous instances as appropriate to the administrative proceedings before the Commission, even in cases involving allegations of criminal conduct,

where the requisite standard in a similar court case would be proof beyond a reasonable doubt. See, for example, Universal Camera Corp. v. NLRB, 71 S. Ct. 456 (1951), Carr v. United States, 337 F. Supp. 1172 (1972), and Finfer v. Caplin, 334 F.2d 38 (2d Cir 1965), cert. denied sub nom. Finfer v. Cohen, 382 U.S. 883 (1965). Accordingly, we find no due process violation in this respect.

The final contention raised under the Fifth Amendment is that the Appeals Officer held a personal bias against appellant. Based upon our review of the record, we find no evidence to support this allegation. We note that the Appeals Officer dismissed the entirety of charge 2 and we find no evidence from a review of the FEAA decision or the relevant portions of the record to support a charge of animus by the Appeals Officer. While it is true that his ultimate conclusion was contrary to appellant's position on the merits of the case against him, that fact alone does not give credence to the bare allegation of bias.

The Board next turns its attention to the First Amendment allegations raised in the request for reopening. When the case was reopened, it appeared that appellant had raised to the Board a substantial argument challenging the validity of the Field Office decision because of its lack of a full analysis of this matter in line with the Supreme Court's "balancing test," which is to be applied to such issues. Accordingly, the Board will attempt to complete such an analysis. However, it should be noted that in its review of the legal principles bearing on this particular issue, the Board otherwise will not review the Field Office determinations concerning the merits of the specifications and charges. That is to say, the matter of whether the allegations of factual occurrences set forth in the charges are sustained will not be reviewed by the Board in this adjudication, inasmuch as, absent the submission of new and material evidence, the Board does not reopen cases in order to relitigate the facts involved or to re-evaluate the evidence concerning those factual issues and,

thus, to substitute its judgment for that of the Appeals Officer on those matters. As noted above, we have found that the five exhibits to the request to reopen do not contain such evidence.

The point of departure in the Board's analysis, and also the benchmark by which the final decision on the applicability of the First Amendment must be measured, is the Supreme Court decision in Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968), in which the Court stated that a balance must be arrived at between the interests of the employee as a citizen, on commenting on matters of public concern, and those of the employer in promoting the efficiency of the services it performs. Starting from the premise that a surrender of Constitutional rights, such as freedom of speech, could not be the price of public employment, the Court recognized certain factors which might, nevertheless, be countervailing in the balance. As cited in Donohue v. Staunton, 471 F.2d 475 (7th Cir 1972), cert. denied, 93 S.Ct.

1419 (1973), they are: whether the statements interfered with the maintenance of discipline or harmony; whether the position requires personal loyalty or confidentiality between employer and employee; whether the employee speaks with greater access to the real facts; whether the statements impede the employee's proper performance; and whether they were so without foundation as to call his/her competence into question. In Pickering, there had been no showing that any adverse reaction had been caused by the employee's statements, and the Court concluded that:

> In sum, we hold that in a case such as this, absent proof of false statements recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. 391 U.S. at 574.

In reaching this conclusion, the Court applied the standard of "malice" set out in New York Times v. Sullivan, 376 U.S. 254 (1964). As recognized in St. Amant v. Thompson, 88 S.Ct. 1323 (1968):

> . . . reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, and there must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication. 88 S. Ct. at 1325.

Therefore, absent "a high degree of awareness of * * * probable falsity," Garrison v. State of Louisiana, 379 U.S. 64, 85 S.Ct. 209 (1964), in the statements made, a finding of malice cannot attach.

The Board has reviewed the evidence of record in this light and finds that, while appellant has admitted to a certain amount of exaggeration, the evidence is insufficient to sustain a conclusion that his statements were actuated by "malice," as that term has been judicially defined. We have considered the Field Office's reliance on the evidence tending to indicate that appellant's

motive may have been his personal gain, rather than the public benefit, but find that, even if true, this would not call for a finding that the statements were made with malice. The Board also notes that appellant made his public statements concerning the validity of his position and other related and unrelated matters after filing an appeal of the classification of his position with the Civil Service Commission, and without waiting for the decision to be issued on the appeal. While we do not condone his precipitous action and hastiness in seeking public exposure, we do not find that this factor, either, suffices to show malice. In this regard, the record shows that the criticism appellant leveled at the agency concerning his own position was found, in the classification appeal decision, to be unsupported as to its extent, but that the decision did confirm that the potential of the position had not been fully realized for several months after appellant's assignment to it.

Having found that appellant's statements were not motivated by malice, we note at this point also that the Field Office found that the agency had not made specific findings that any of the appellant's statements were false, and in accordance with this, it only examined these statements to determine if they were "misleading," rather than false.

With this in mind, the only question for resolution is how weighty the various countervailing factors, cited in Pickering, are in this case. In reaching our conclusions, the Board has surveyed cases involving this issue as relevant indicia of the weight accorded to the various factors. Meehan v. Macy, 392 F.2d 882 (DC Cir.1968), decided without reference to Pickering, found no violation of the employee's Constitutional rights when he was discharged for publishing a derogatory poem concerning a plan his agency was considering implementing in the Canal Zone. In this case, the court noted that the possible consequences of the

publication included "rioting," "disharmony, inefficiency, dissension, and even chaos." In Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633 (1974), the Court did not specifically reach the issue, but noted that, "that public speech which improperly damages and impairs the reputation and efficiency of the employing agency," 416 U.S. at 162 and 94 S.Ct. at 1642, is prescribed [sic]. It stated that, if the charges were sustained, charges which referred to the employee's statements that agency officials had accepted bribes and failed to perform their duties, no Constitutional violation would occur. Further, in Lefcourt v. The Legal Aid Society, 312 F. Supp 1105 (1970), aff'd 445 F.2d 1150 (2d Cir 1971), the court found that the requisite personal, confidential relationship in the position held by an attorney for the defendant Legal Aid Society. It also found that interrelationships among the employees had become "personality conflicts" because of the statements. In distinguishing Pickering, the court noted that it involved

public debate, whereas the case before it involved only internal, private debate.

Among the cases finding a Constitutional violation is Donahue v. Staunton, supra, wherein a hospital chaplain published scathing charges about the care received by the hospital patients, which the court found "exaggerated." In reaching its conclusion, the court found, regardless of these remarks, that the employee's duties had not been interfered with, that there was no personal relationship requiring confidentiality, and that the employer apparently was not hindered in responding to the charges because of the added credibility of a priest or one who was intimately associated with the matters about which he had written.

Mt. Healthy City School District Board of Education v. Doyle, 97 S. Ct. 568 (1977), involved a teacher's call to a radio station concerning a proposed teacher dress code.

Once again, although the teacher would have had "presumed greater access to the real facts,"

Pickering, supra, the Court concluded that his failure to be granted tenure, if due to his speech, would be constitutionally impermissible. Relative to the confidential relationship test, the court in Hostrop v. Board of Junior College District Number 515, 471 F.2d 488 (7th Cir 1972), found no such personal relationship required in the work of a college president and the Board of the college.

One further case we note is Tygrett v. Washington, 543 F.2d 840 (D.C. Cir 1974), wherein a probationary police officer advocated a "blue flu" in a proposed pay raise did not become effective. The Court of Appeals noted that the crucial question was whether the remarks "actually impinged on qualities making for an effective police force in such a manner as to imperil its efficiency," 543 F.2d at 848, that the Government had the burden of proof on this issue, and that:

> Governmental action affecting fundamental rights does not enjoy a presumption of constitutionality; rather, the burden is

upon the Government to show a compelling governmental interest justifying the intrusion. 543 F.2d 849.

Having carefully considered judicial precedent, the Board concludes that the balance in the instant case weighs in favor of appellant. We have reviewed the considerable testimony devoted toward showing an impairment of efficiency and find that, while it does indicate a certain disruption of the orderly day-to-day routine of the agency, largely caused by the discussions engendered about the statements, it does not prove an actual lessening of efficiency by the agency in accomplishing its mission or substantial disharmony among co-workers sufficient, in the Board's view, to weigh significantly in the balance. The nature of the relationship between appellant and his supervisors would seem to be no more confidential than that of the college president in Hostrop or the chaplain in Donahue. Further, while the view of the public as to appellant's access to the relevant facts

would tend to be high by virtue of his position, the Board cannot say that this access would be greater than that evidenced in Donahue and, perhaps, Mt. Healthy. As to the final test, whether the employee's competence is called into question because his/her statements were so without foundation, the Board refers to the finding in the appellant's classification appeal decision, noted above, and finds that this, too, does not support an infringement on his right of speech. We note, as well, that appellant's statements were to the effect that he had little productive work to do, and that this might be indicative of a lessening of his personal efficiency. However, the agency apparently has not taken issue with appellant's efficiency, as it did not charge him with inefficiency and did not refute his counsel's statements as to his competence.

The factors considered on the other side of the balance include appellant's interest in free speech, as well as the societal interests cited

by appellant in the request for reopening. Such interests include a right to disclosure of information about how tax dollars are spent and about the functioning of government apparatus, an interest in the promotion of the efficiency of the government, and in the maintenance of an atmosphere of freedom of expression by the scientists and engineers who are responsible for the planning and implementation of the nation's space program. While the agency's, and society's, interest in the effective functioning of that program is no less great, we find that, because appellant's statements were not wholly without truth, they properly stimulated public debate. In this case, the nature or extent of proven disruption to the agency's operation, in the Board's view, does not justify abrogation of the exercise of free speech.

Accordingly, the Board hereby reverses the August 12, 1976 decision of the Atlanta Field Office, FEAA. As corrective action, we recommend that appellant's change to lower grade be cancelled

and that he be restored to his former position, grade, and pay, restoactively to November 30, 1975. Documentation of compliance with this decision should be submitted to the Board, Attn: Compliance Desk, within 30 days of receipt of the decision.

There is no right of administrative appeal from a Board decision on a request for reopening. Administrative remedies are technically exhausted upon the issuance of a decision by the FEAA Appeals Officer. However, section 772.312 of the Civil Service regulations provides that the Commissioners, in their discretion, and notwithstanding the exhaustion of the right of appeal or the pendency of suit, may reopen and reconsider any previous decision on their own motion or when the party requesting reopening submits written argument or evidence which tends to establish that:

> the previous decision of the Board on a request to reopen and reconsider involves policy implications extending beyond the case at hand of such significance as to

merit the personal attention of the Commissioners.

If the agency has evidence or argument which is believed to meet this criterion, it must submit its request for reopening not later than 30 days from the date of this decision.

If the appellant has evidence or argument which is believed to meet this criterion, a request for reopening must be submitted within a reasonable time after receipt of this decision.

Such request should be sent to:

Assistant to the Commissioners (Appeals)
U.S. Civil Service Commission
Washington, D. C. 20415

For the Board:

Sincerely yours,

S/ Peggy S. Griffiths
Peggy S. Griffiths
Chairman

APPENDIX E

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

October 10, 1978

Mr. S. Neil Hosenball
General Counsel
National Aeronautics and
Space Administration
Washington, D. C. 20546

Dear Mr. Hosenball:

This is in further response to your petition dated August 21, 1978 on behalf of the National Aeronautics and Space Administration requesting the Commissioners of the Civil Service Commission to reopen and reconsider the appeal case of Mr. William C. Bush which was decided by the Commission's Appeals Review Board on July 14, 1978.

Section 772.312 of the Civil Service regulations provides in pertinent part that the Commissioners may, in their discretion, reopen and reconsider a previous decision of the Appeals Review Board when

the party requesting reopening submits written argument or evidence which tends to establish that the previous decision of the Board on a request to reopen and reconsider involves policy considerations extending beyond the case at hand of such significance as to merit the personal attention of the Commissioners.

We have carefully considered the written argument submitted in support of the request to have this case reopened. We find that it is not sufficient to meet the above criteria for reopening a previous decision of the Appeals Review Board. The file reflects that the issues pertinent to the adjudication of this appeal were fully considered by the Board in reaching its decision. We concur in the decision of the Board. The request to reopen this case must, therefore, be denied.

In view of the above the decision of the Board remains the final decision of the Civil Service Commission on this appeal and must be complied with by the agency. Evidence of compliance with

the Board's decision must, therefore, be forwarded to the Board without further delay.

For the Commissioners:

Sincerely,

S/ Robert B. Bates

Robert B. Bates
Assistant to the
Commissioners (Appeals)

APPENDIX F

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article 3, § 2, Cl. 1 of the United States Constitution, provides in pertinent part, that

> The judicial Power [of the United States] shall extend to all Cases. . .arising under this Constitution . . .[and] the Laws of the United States. . . .

The First Amendment to the Constitution of the United States provides, in pertinent part, that:

> Congress shall make no law . . .abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that

> No person shall ... be deprived of life, liberty or property ... without due process of law.....

Prior to 11 January 1979, Section 1301 of Title 5 of the United States Code provided that:

> The Civil Service Commission shall aid the President, as he may request, in preparing the rules he prescribes under this title for the administration of the competitive service.

At all material times, 5 U.S.C. § 3302 has provided in pertinent part, that:

> The President may prescribe rules governing the competitive service. . . .

As of 14 July 1976, the date of the C.S.C. Appeals Review Board's decision alluded to in the penultiate paragraph of the Fifth Circuit's opinion in this case (598 F. 2d 958 at 961), Section 5596 of Title 5 of the United States Code provided, in pertinent part, that:

> (a) For the purpose of this section, "agency" means--(1) An Executive agency....
>
> *** *** ***
>
> (b) An employee of an agency who, on the basis of an administrative determination or timely appeal, is found by appropriate

authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the. . . reduction of. . .a part of the pay allowances, or differentials of the employee -

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during the period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period. . . .

(c) The Civil Service Commission shall prescribe regulations to carry out this

section. . . .

Prior to a day in January 1979, Section 7511 of Title 5 of the United States Code provided, in pertinent part, that:

(1) "preference eligible employee" means a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive agency. . . .

*** *** ***

(2) "adverse action" means a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay.

Prior to the same date, 5 U.S.C. § 7512 provided, in pertinent part, that:

(a) An agency may take adverse action against a preference eligible employee. . . only for such cause as will promote the efficiency of the service. . . .

Prior to the same date, 5 U.S.C. § 7701 provided that:

A preference eligible employee as defined by section 7511 of this title is entitled to appeal to the Civil Service Commission from an adverse decision under section 7512 of this title of an administrative authority so acting. The employee shall submit the appeal in writing within a reasonable time after receipt of notice of the adverse decision, and is entitled to appear personally or through a representative under regulations described by the Commission. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommendations to the appellant or his representative. The administrative authority shall take the corrective action that the Commission finally recommends.

Section 1331 of Title 28 of the United States Code provides, in part, that:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arising under the Constitution, laws, or treaties of the United States. . . .

Section 1442 or Title 28 of the United States Code provides, in pertinent part, that:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place therein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office. . . .

As of the time that Lucas removed the action against him from state to federal court, Section 1446 of Title 28 of the United States Code provided, in pertinent part, that:

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.
>
> (b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such

> action or proceeding is based. . . .
>
> *** *** ***
>
> (d) Each petition for removal of a civil action or proceedings. . . .shall be accompanied by bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.
>
> (e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.
>
> *** *** ***

Prior to 1 January 1979, Civil Service Rule 5.1 read, in pertinent part, as follows:

action or proceeding is based. . . .

*** *** ***

(d) Each petition for removal of a civil action or proceedings. . . .shall be accompanied by bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

*** *** ***

Prior to 1 January 1979, Civil Service Rule 5.1 read, in pertinent part, as follows:

(a) The [Civil Service] Commission is authorized and directed to promulgate and enforce such regulations as may be necessary to carry out the provisions of the Civil Service Act and Rules, the Veterans' Preference Act, and all other applicable statutes or executive orders imposing responsibilities on the Commission.

*** *** ***

(Exec. Order No. 10577, as amended; 19 Fed. Ref. 7521 [1956].)

The pertinent portions of the Civil Service Regulations in force at the time of the administrative review referred to in the opinions below read as follows: [5 CFR, Ch. 1,] PART 752 - ADVERSE ACTIONS BY AGENCIES

*** *** ***

Subpart A - General Provisions

[5 CFR] § 752.101 Applicability

This part applies to removals, suspensions, furloughs without pay, and reduction in rank or pay of employees of the Government of

(a) The [Civil Service] Commission is authorized and directed to promulgate and enforce such regulations as may be necessary to carry out the provisions of the Civil Service Act and Rules, the Veterans' Preference Act, and all other applicable statutes or executive orders imposing responsibilities on the Commission.

*** *** ***

(Exec. Order No. 10577, as amended; 19 Fed. Ref. 7521 [1956].)

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*** *** ***

Subpart A - General Provisions

[5 CFR] § 752.101 Applicability

This part applies to removals, suspensions, furloughs without pay, and reduction in rank or pay of employees of the Government of

the United States . . .

*** *** ***

[5 CFR] § 752.104 General standards.

(a) An agency may not take adverse action against an employee covered by this part except for such cause as will promote the efficiency of the service. . . .

*** *** ***

[5 CFR] § 752.202 Procedures.

(a) Notice of proposed adverse action.

(1)***

[A]n employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action.

(2) *** [T]he material on which the notice is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may

review the material.

*** *** ***

(b) Employee's Answer.

*** [A]n employee is entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answers.

*** If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in writing.

*** When the employee requests an opportunity to answer personally, the agency shall make a representative available to hear his answer. The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.

*** *** ***

(f) Notice of Adverse Decision.

The employee is entitled to notice of the agency's decision at the earliest practicable date. The decision shall be made by a higher level official of the agency, when that exists, than the office that proposed the adverse action. The agency shall deliver the notice of decision to employee at or before the time the action will be made effective. The notice shall be in writing, be dated, and inform the employee:

(1) Which of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained;

(2) Of his right of appeal to the appropriate office of the [Civil Service] Commission;

(3) Of the time limit for appealing as provided in Section 752.204; and,

(4) Where he may obtain information on how to pursue an appeal.

[5 CFR] § 752.203 Right of appeal to the Commission.

An employee is entitled to appeal to the Commission from an adverse action covered by this subpart. The appeal shall be in writing and shall set forth the employee's reasons for contesting the adverse action, with such offer of proof and pertinent documents as he is able to submit.

(b) Finality of the decision.

The decision of the office of [Civil Service] Commission having appellate jurisdiction is final. However, either party to the appeal may petition the Appeals Review Board to reopen and reconsider the decision under § 772.310 of this chapter.

*** *** ***

[5 CFR, ch.1, Part 752]

Subpart D - Reversals of Adverse Actions

[5 CRF] § 752.401 Agency action when Commission recommends restoration or other corrective action .

It is mandatory that the agency take all corrective action recommended in the decision of the

[Civil Service] Commission office having appellate jurisdiction unless the agency petitions the Appeals Review Board to reopen and reconsider the decision under § 772.310 of this chapter.

*** *** ***

[5 CFR Ch. 1] PART 772 - APPEALS TO THE COMMISSION

*** *** ***

Subpart A - Office of the Commission Authorized to Decide Appeal

§ 772.101 The Federal Employee Appeals Authority.

The Federal Employee Appeals Authority reports directly to the [Civil Service] Commission and has authority to make final decisions on appeals to the Commission except as otherwise provided.

§ 772.102 The Appeals Review Board.

The Appeals Review Board reports directly to Commission. The board has authority to reopen and reconsider any decision of the Federal Employee Appeals Authority as provided in

§ 772.310. . . .

*** *** ***

Subpart C - Commission's Appellate Review of Actions Against Employees.

[5 CFR] § 772.301 Coverage.

(a) Agency-Initiated Actions.

Except as otherwise provided, this subpart applies to appeals to the Federal Employee Appeals Authority (hereinafter referred to as the Appeals Authority) under . . . Subparts B and C of Part 752 of this chapter.

*** *** ***

§ 772.305 Evidence.

(a) Affidavits. Statements of witnesses shall be by affidavit, when practicable, and relative to the adverse decision. It is the responsibility of both parties to the appeal to submit all evidence to the appropriate office of the Appeals Authority. . . .

(b) Availability of evidence and representations.

A representative of the Appeals Authority shall discuss all relevant representations and evidence with both parties and make the presentations and evidence available to them for review. . . .

*** *** ***

[5 CFR] § 772.307 Hearings.

(a) Coverage. This section applies. . . to appeals under Subpart B of Part 752 of this chapter. . . .

(b) Right to a Hearing. An appellant is entitled to a hearing before the office of Appeals Authority having jurisdiction of the appeal. That office shall inform the appellant of his right to a hearing. If the appellant does not desire a hearing, he shall so advise that office in writing.

(c) Hearing procedures.

(1) An appellant is entitled to appear at the hearing on his appeal personally or through or accompanied by his representative. The agency

is also entitled to participate in the hearing. Both parties are entitled to produce witnesses. The Appeals Authority is not authorized to subpoena witnesses.

(2) Any agency that has employees entitled to appeal to the Appeals Authority under this part shall make its employees available as witnesses at the hearing when (i) requested by the Appeals Authority after consideration of a request by the appellant or the agency and (ii) it is administratively practicable to comply with the request of the Appeals Authority. If the agency determines that it is not administratively practicable to comply with the request of the Appeals Authority, it shall submit to the Appeals Authority its written reason for the declination. If the reason for the declination is adequate, the Appeals Officer shall insert the explanation in the record, notify the appellant that his request for the witness(es) has been denied and provide the appellant with the reason for the denial. Employees of the agency shall be in a duty status

during the time they are made available as witnesses. Employees of the agency shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

(3) An appeals officer of the Appeals Authority shall conduct the hearing and shall afford the parties opportunity to introduce evidence (including testimony and statements by the appellant, his representative, representatives of the agency, and witnesses), and to cross-examine witnesses. Testimony is under oath or affirmation. Rules of evidence are not applied strictly, but the appeals officer shall exclude irrelevant or unduly repetitious testimony. The appeals officer may exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(4) Except as provided in subparagraph (5) of this paragraph, attendance at the hearing will be limited to persons determined by the appeals officer to have a direct connection with the appeal.

(5) When requested by the appellant and the agency does not object, the appeals officer shall hold a public hearing. When the agency objects, the appeals officer may deny the appellant's request only when he determines this action to be in the best public interest. The appeals officer[s], in his discretion, may close one or more sessions of a public hearing, when he determines that this action is in the best interest of the appellant, a witness, or the Government. The reasons for the appeals officer's decision to deny a request for a public hearing or to close one or more sessions of a public hearing shall be made a part of the record.

(6) The hearing is reported verbatim. The transcript is part of the record of the proceedings and a copy of the transcript shall be furnished to each party.

[5 CFR] § 772.308 Closing the record

(a) The Appeals Authority shall close the record in any case after the parties to the appeal have had a full opportunity to present any and all

relevant and material evidence. When there is a hearing, the record shall be closed at the conclusion of the hearing except that the appeals officer has discretion to permit the parties to submit written argument or briefs after the record is closed.

(b) When the record is closed there is no right to submit additional evidence into the record.

[5 CFR] § 772.309 Decision on Appeal

(a) The office of the Appeals Authority having initial jurisdiction of the appeal shall issue a written decision and send copies thereof to the appellant, his representative, and the agency. The decision on each appeal covered by this part shall contain an analysis of the evidence, findings, a statement of the reasons for the conclusions reached, and recommendation for any corrective action required. The agency shall report, within 30 calendar days after the receipt of the decision, that it has carried the decision into effect or that it is petitioning

the Appeals Review Board to reopen and reconsider the decision under section 772.310 of this chapter.

(b) The decision of appeal officer is final and there is no further right of appeal.

[5 CFR] § 772.310 Reopening and Reconsideration by the Appeals Review Board.

(a) Requests for a reopening and reconsideration. Either party may request the Appeals Review Board (hereinafter referred to as "Board") to reopen and reconsider any previous decision of an appeals officer. The Board may reopen and reconsider the decision when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the decision of the appeals officer was issued:

(2) The previous decision of the appeals officer involves an erroneous interpretation of law or regulation, or a misapplication of established policy; or

(3) The decision of the appeals officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand.

*** *** ***

(c) Where to file. Requests to reopen and reconsider a decision of an appeals officer shall be filed with the Appeals Review Board, U. S. Civil Service Commission, Washington, D.C. 20415.

(d) How to file. A request to reopen and reconsider a decision of an appeals officer shall be in writing and set forth in detail the reasons for the request.

(e) Impact of a request to reopen upon the previous decision.

*** *** ***

(2) An agency request for reopening under paragraph (a) of this section shall stay the corrective action recommended by the appeals officer. . . .

*** *** ***

(f) Board procedures. The Board shall review any request to reopen to determine whether a basis for reopening under § 772.310 (a) has been established. When the Board determines that the request does not establish a basis for reopening the Board shall notify the requesting party in writing of its decision to deny the request. When the Board reopens a previous decision, the Board will determine and conduct whatever further investigation is necessary. There is no right to a hearing before the Board. The Board may, in its discretion, afford the parties an opportunity to appear personally and present oral argument and representations.

(g) Reconsideration Decision of the Board. When the Appeals Review Board has reopened an appeals officer's decision for reconsideration, it shall review the record of the proceedings and all written representations. The Board shall issue a written decision and shall send copies thereof to the parties and to the employee's representative. The decision of the Board is final. When corrective action is recommended, the agency shall report

promptly to the Board that the corrective action has been taken.

*** *** ***

[5 CFR] § 772.312 Review by the Commission.

(a) The [Civil Service] Commissioners may, in their discretion, reopen and reconsider any previous decision on their own motion or when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) The previous decision of the Board on a request to reopen and reconsider involves policy implications extending beyond the case at hand of such significance as to merit the personal attention of the Commissioners. . . .

*** *** ***

(b)*** When a request to reopen is denied, the agency shall effect the corrective action recommended by the Board, and there is no further right by the agency to request reopening. . . .

The text of Rule 56(f) of the Federal Rules of Civil Procedure reads as follows:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----*----

No. 351 - August Term, 1978

Argued November 14, 1978

Decided December 6, 1979

Docket No. 78-2098

----*----

NELSON HERNANDEZ,

Plaintiff-Appellant,

-v-

C. LATTIMORE, NATHANIEL MITCHELL, HUGH HERBERT, N. AVIGNONE, and R. BROWN, Correctional Officers, Metropolitan Correctional Center,

Defendants-Appellees.

----*----

Before: WATERMAN and TIMBERS, Circuit Judges, and NICKERSON, District Judge*

----*----

* Hon. Eugene H. Nickerson of the U. S. District Court for the Eastern District of New York, sitting by designation.

Relying upon the authority of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), appellant, an incarcerated prisoner, alleging violation of his constitutional rights by defendants, federal correctional officers, sought damages for their alleged tortious acts allegedly injuring him. The court below, S.D.N.Y., Brieant, J., dismissed the complaint. The judgment of dismissal is reversed and the cause remanded for further proceedings below.**

----*----

JOHN BOSTON, New York City (William E. Hellerstein and Robert B. Shapiro, The Legal Aid Society, Prisoners' Rights Project, New York City), for Plaintiff-Appellant.

KENT T. STAUFFER, Asst. U.S. Attorney (Robert B. Fiske, Jr., U.S. Attorney, S.D.N.Y., and Patrick H. Barth, Asst. U.S. Attorney, of counsel), for Defendants-Appellees.

** This unanimous opinion replaces the opinions filed on June 7, 1979 in this appeal. Those opinions are withdrawn.

WATERMAN, Circuit Judge:

Plaintiff appeals from a judgment entered in the United States District Court for the Southern District of New York, (Brieant, District Judge), dismissing his complaint for failure to state a claim upon which relief could be granted and for lack of subject matter jurisdiction. In his complaint plaintiff sought to recover damages for alleged injuries caused by excessive and unnecessary force applied to him by the defendants, federal correctional officers, while he was an incarcerated prisoner. He relied upon the authority of Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S Ct. 1999, (1971), his claim being that he suffered cruel and unusual punishment despite the protection guaranteed him by the Eighth Amendment. To this constitutional claim plaintiff appended a state law assault and battery claim. The court below decided that the constitutional remedy provided for in Bivens against the individual officers had been preempted by the amendment to the Federal Tort Claims Act (FTCA)

adopted subsequent to the events in Bivens, by which, 28 U.S.C. §2680(h), on March 16, 1974, the government had waived its sovereign immunity for assaults and batteries. Accordingly, the court below granted summary judgment in favor of defendants, thereby dismissing plaintiff's Bivens action in light of its finding that there was now a full and adequate remedy against the government itself available to the plaintiff under the FTCA. Having thus disposed of plaintiff's constitutional claim, the court below also dismissed plaintiff's pendent state law claim on the ground of a lack of subject matter jurisdiction. We reverse the judgment dismissing plaintiff's complaint and remand the cause for further proceedings below inasmuch as we expressly find that the existence of the FTCA provision does not preempt a Bivens action.

This litigation is based on events that took place on the evening of October 4, 1976, at the Metropolitan Correctional Center (M.C.C.) in New York City, where Hernandez was incarcerated.

According to information elicited in the district court proceedings, on that evening Hernandez overturned a salad tray in the M.C.C. cafeteria during the evening meal. Although the complaint does not recite the events leading up to the initial altercation, statements made at argument on the defendants' motion to dismiss indicated that by overturning the salad tray Hernandez was protesting a correctional officer's failure, or refusal, to supply him with silverware to replace the plastic utensils that were available.[1] Shortly after dinner was served Hernandez returned to his cell. He alleges that soon after his return defendants Lattimore, Mitchell, Herbert, Avignone and Brown visited his cell, allegedly conducted a "strip-search," and later escorted him fully clothed into an elevator which deposited him at a third-floor holding area.[2]

The complaint focuses on alleged attacks upon him which Hernandez claims occurred while en route to the holding area. Hernandez charges that, while surrounded by defendants Mitchell, Herbert,

Avignone, and Brown, he was punched about the face and body by defendant Lattimore, and kicked by an unidentified defendant. Hernandez insists that these attacks occurred without provocation or because of any disobedience to orders. The complaint further alleges that while bleeding profusely he was deposited in the holding area where he received no medical attention.[3]

As a result of the actions of the correctional officers, Hernandez asserts that he sustained injuries to his face, mouth, and body, as well as his psyche. Hernandez charges that the conduct of the defendant officers amounted to a violation of his Eighth Amendment right to be free from cruel and unusual punishment and constituted assault and battery under state law as well. He seeks $60,000 in compensatory damages jointly and severally from the defendants and an additional $120,000 in punitive damages.

The defendants pleaded a general denial to all the allegations of the complaint and also asserted as affirmative defenses that their

conduct was lawful; that the court lacked subject matter jurisdiction; and that plaintiff failed to state a claim upon which relief could be granted. Additionally, defendant Lattimore affirmatively pleaded self-defense, and he counterclaimed for $5,000 compensatory damages and $10,000 in punitive damages for assault and battery by plaintiff upon him.[4]

After so pleading, defendants moved to dismiss the federal claim for failure to state a claim upon which relief could be granted, and moved for dismissal of the pendent state claim for lack of federal court subject matter jurisdiction. Inasmuch as there was a consideration of matters outside the pleadings, the motion for dismissal was treated by the district court as a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.[5]

The district court, although recognizing that a private damage remedy may be implied directly from the Constitution under Bivens, supra, and its progeny, concluded that the availability of a

"full and adequate" remedy under the FTCA precluded a Bivens remedy. Acknowledging that the FTCA did not set forth a full alternative to a Bivens remedy, the court found that the alleged inadequacies of the statutory remedy[6] did not deprive Hernandez of an efficacious vehicle for the vindication of his federally secured rights under the Eighth Amendment. As stated by the district court, "[t]he Federal Tort Claims Act, . . . provides the very remedy that Mr. Hernandez seeks, and which was not then available to Webster Bivens - money damages." In reliance, therefore, on the existence of an alternative specific statutory remedy,[7] the district court determined that, pursuant to the FTCA, Hernandez' federal rights could be fully redressed, and so refused to imply a constitutional remedy under Bivens.

Our review of the district court's judgment dismissing plaintiff's complaint naturally begins with the Supreme Court's seminal decision in Bivens v. Six Unknown Named Agents, 403 U.S. 388,

91 S.Ct. 1999 (1971), wherein the Court held that a cause of action for damages against federal law enforcement officers who violate the Fourth Amendment could be inferred directly from provisions of the U. S. Constitution.

On the morning of November 26, 1965, Webster Bivens' apartment was entered by agents of the Federal Bureau of Narcotics, who, acting under the cloak of federal authority, and without probable cause or warrant, caused Bivens to be arrested for alleged narcotics violations. The complaint filed against Bivens was, however, subsequently dismissed by the United States Commissioner. Bivens brought an action against the individual officers, seeking $15,000 jointly and severally in compensatory damages. The complaint alleged that the arrest and events preceding his arrest had caused Bivens great humiliation, embarrassment, and mental suffering. The district court dismissed the complaint for lack of federal jurisdiction. Bivens v. Six Unknown Named Agents, 276 F.Supp. 12 (E.D.N.Y. 1967). We affirmed the district

court and, despite recognition that an action for trespassory damages should be maintainable in federal courts,[8] determined that, in view of the availability of injunctive relief, the exclusionary rule, and state law tort actions for the vindication of Bivens' rights, another judicially created damage remedy was not indispensable to the effectuation of the Fourth Amendment protections. Bivens v. Six Unknown Named Agents, 409 F.2d 718 (2d Cir 1969). On certiorari, the Supreme Court reversed and held, inter alia:

> The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. . . . Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has

> suffered as a result of the agents' violation of the Amendment.

Bivens, supra, 403 U.S. at 397, 91 S.Ct. at 2005 (citations omitted).

The holding in Bivens represented the first judicial recognition of a cause of action implied directly under a constitutional provision. Up until the Bivens decision litigants armed only with the general jurisdictional statute, 28 U.S.C. §1331, were relatively unsuccessful in utilizing the positive law of the Constitution as a vehicle to force affirmative action. See, e.g., Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 (1946); cf. Jacobs v. United States, 290 U.S. 13 (1933) (Fifth Amendment: just compensation).

The keystone of the Bivens decision was the Court's recognition that the commands of the Fourth Amendment created an affirmative federal right to be free from unreasonable searches and seizures, a right which could be redressed in money damages in the absence of explicit congressional action

authorizing the remedy. In fashioning a remedy for Bivens directly under the Fourth Amendment with 28 U.S.C. §1331 as a jurisdictional base, the Court reasoned that although the Fourth Amendment does not "in so many words provide for its enforcement by an award of money damages for the consequence of its violation," federal courts possess the power to use traditionally available judicial remedies when necessary for redress. Bivens, supra, 403 U.S. at 396, 91 S.Ct. at 2004, citing Bell v. Hood, 327 U.S. 678, 684 (1946). See also J.I.Case Co. v. Borak, 377 U.S. 426, 84 S.Ct. 1555 (1964).

Urging restraint in the exercise of this inherent remedial power, the government in Bivens argued that a federal damage remedy was unnecessary to enforce the affirmative commands of the Fourth Amendment. Relying primarily on the availability of state actions in tort, the government reasoned that, where Congress has not expressly authorized a particular remedy, federal courts should imply judicial relief only where the remedy is indispensable or essential for the vindication of the

interest protected. The Supreme Court, however, rejected this argument, maintaining that state law remedies might be inadequate inasmuch as "[t]he interests protected by state laws regulating trespass and invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile." Bivens, supra, 403 U.S. at 394, 91 S.Ct. at 2003.

In the case sub judice, the government argues in support of the judgment of the court below that the converse of the position taken in Bivens is applicable because "where Congress has acted to establish a remedial scheme (FTCA), the more general remedies usually available to the courts are foreclosed." The government reasons that in view of the availability of a remedy under the FTCA, the case before us does not arise in the remedial void which caused the Supreme Court to imply a remedy in Bivens and the absence of this void, therefore, justifies the district court's refusal to imply a constitutional remedy in the

proceedings below.

The persuasiveness of the government's argument is greatly diminished, however, by a reading of the legislative history of 28 U.S.C. §2680(h), the amendment tc the FTCA involved here. Certainly, of course, the present case does not arise in the remedial void that handicapped Webster Bivens in pursuing a federal claim against the government, for the remedial void was indeed closed by congressional action in 1974 with the amendment to the FTCA. Nevertheless, it seems clear that Congress in closing that void did not intend to shut out damage actions against government officers who violate constitutionally secured rights. It is clear that the amendment was specifically designed to prevent abuses of the federal no-knock statute such as those which occurred in Collinsville, Illinois.[9] The Senate Committee which reported out the amendment viewed the abolition of sovereign immunity as creating in favor of "innocent individuals who are subjected to raids of the type conducted in Collinsville"

a cause of action against the government itself, a cause of action which would exist side by side with a Bivens action against the individual officers.

> [T]his provision should be viewed as a counterpart to the Bivens case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in Bivens (and for which that case imposes liability upon the individual Government officials involved).

S. Rep. No. 93-588, 93d Cong. 2d Sess., reprinted in (1974) U.S. Code Cong. & Admin. News at 2791. Therefore, even a cursory reading of the Senate Committee Report demonstrates a congressional intent to provide a remedy against the federal government in addition to, but not wholly in the place of, the private cause of action created by Bivens. See Norton v. United States, 581 F.2d

390, 395, (4th Cir.), cert. denied, 90 S.Ct. 613 (1978). Furthermore, it is important to note that whenever Congress intended to make the FTCA remedy the exclusive remedy it has done so explicitly. For example, Congress exempted federal employees acting in the course of their employment from damage suits arising out of the negligent operation of motor vehicles. 28 U.S.C. §2697 (1970). See also 38 U.S.C. §4116 (medical malpractice).

However, we wish to make clear that although we find there to be the two remedies and reverse the district court's finding that the FTCA remedy has preempted the Bivens remedy, the two remedies do not stand in pari materia. The FTCA provision, providing a vehicle for the redress of certain common law torts, has a broader remedial scope than that accompanying a Bivens action. This is so because Bivens requires that there have been a constitutional violation giving rise to federal question jurisdiction under 28 U.S.C. §1331; and we recognize, as have other courts, that some common law torts and some statutory torts, although

actionable in state forums, do not rise to the level of constitutional violations. Atkins v. Lanning, 556 F.2d 485, 489 (10th Cir. 1977); Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977); Smith v. Spina, 477 F.2d 1140, 1143 (3d Cir. 1973); Wells v. Ward, 470 F.2d 1185, 1187 (10th Cir. 1972); Corby v. Conboy, 457 F.2d 251, 254 (2d Cir. 1972). The converse is equally true insofar as some conduct is actionable under the Constitution that involves no force or violence and for which there exists no counterpart in the common law. See, e.g., Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590 (1958) (expatriation). Just as malpractice does not become a constitutional violation merely because the victim is a prisoner, Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 292 (1976), so, too, not every assault and battery gives rise to a cause of action under the Eighth Amendment because the victim happens to be a prisoner. As Judge Friendly observed in Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973):

Certainly the constitutional protection is nowhere nearly so extensive as that afforded by the common law tort action for battery, which makes actionable any intentional and unpermitted contact with the plaintiff's person or anything attached to it and practically identified with it . . . still less is it as extensive as that afforded by the common law action for assault, redressing "Any act of such a nature as to excite an apprehension of battery" . . . .

Accord, Arroyo v. Schaefer, 548 F.2d 47, 50 (2d Cir. 1977).

In conclusion, it should be noted that the preemptive analysis employed by the district court and the attendant judgment dismissing plaintiff's complaint precluded any consideration of the merits of plaintiff's federal and state law claims in the proceedings below.[10] We emphasize that our reversal of the district court's judgment is

predicated solely upon the court's finding that the amendment to the FTCA has preempted plaintiff's Bivens action. Accordingly, in view of the procedural posture of this case, we deem it inappropriate at this time to express any opinion as to the merits of plaintiff's underlying claims. Indeed, we believe that a remand of the cause to the court below is called for here to afford the trier of fact the first opportunity to pass upon the merits of plaintiff's claims.

Therefore, the proceedings in the district court on remand should be directed toward an evaluation of the alleged conduct of the defendants, and a determination whether, assuming the alleged conduct in fact occurred, such conduct constituted a violation of Hernandez' Eighth Amendment right to be free from cruel and unusual punishment or whether such conduct amounted merely to an invasion of his state-created rights which commonly is redressed by actions in tort.

Finally, we note that in the proceedings below the district judge had expressed a willingness to allow plaintiff to amend his complaint to include a Fifth Amendment claim. Although the plaintiff's complaint was not so amended, plaintiff did assert a due process claim in a pre-trial memorandum, as well as in answers to interrogatories. In view of recent developments in this area of the law, see, e.g., Davis V. Passman, 47 U.S.L.W. 4643 (U.S. June 5, 1979), and the district judge's prior expression of willingness to permit such an amendment, plaintiff should be entitled to amend his complaint in the proceedings on remand to include a Fifth Amendment claim if he so desires.

Judgment reversed and cause remanded to the district court for further proceedings.

FOOTNOTES

[1] The pertinent allegations of the complaint read as follows:

FIRST CLAIM FOR RELIEF

7. Shortly after dinner was served at floor 9 North at M.C.C. on October 4, 1976, plaintiff returned to his cell on the same floor.

8. Several minutes later, Defendants LATTIMORE, MITCHELL, HERBERT, AVIGNONE and BROWN arrived at plaintiffs' [sic] cell and ordered him to accompany them.

9. Plaintiff accompanied these five defendants to the elevator at 9 North and they all went into the elevator.

10. While in the elevator, plaintiff was punched about the face and body by defendant LATTIMORE while plaintiff was surrounded by defendants MITCHELL, HERBERT, AVIGNONE and BROWN. One of the defendants kicked the plaintiff while he was on the elevator.

11. During the incident described in paragraphs 8-10, plaintiff disobeyed no orders by any prison official, nor did he strike or attempt to strike anyone.

12. Solely as a result of the brutal, malicious, and unlawful beating inflicted by defendants, plaintiff received severe injuries to his face, mouth, and body.

13. After the beating, plaintiff was taken to a holding area on the third floor of the M.C.C.

(Appendix at 5a, 6a).

[2] The defendants' answer indicates that Hernandez was ordered to return to his cell by officers of the M.C.C. following his outburst in the cafeteria. Additionally, the amended answer of defendant Lattimore states that he, along with other correctional officers, was ordered to remove Hernandez from the ninth floor to the third floor of the M.C.C.

The holding areas, such as the one in which Hernandez was deposited, are commonly used for newly arrived prisoners awaiting cell assignment, for prisoners who present disciplinary problems, and for prisoners awaiting psychiatric testing.

[3] The complaint charged that "[s]ometime later on the same night, defendant EDWARDS came into the area where plaintiff was being held. He did nothing to aid or treat plaintiff, who was bleeding profusely, for his injuries." Plaintiff's complaint ¶14. Hernandez contended that Edwards' failure to offer him emergency medical assistance prolonged his mental pain and physical suffering, and constituted a deliberate indifference to serious medical needs of a prisoner in violation of the Eighth Amendment's prohibition against cruel and unusual punishments. See Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976).

The complaint with respect to defendant Edwards was, however, dismissed on the consent of the parties by Stipulation and Order filed on December 27, 1977.

[4] Defendant Lattimore alleges that Hernandez assaulted and struck him first, whereupon Lattimore used only such force as was necessary to defend himself and restrain appellant. Amended Answer, Defendant Lattimore, ¶12-13.

[5] Although we reverse the district court's judgment dismissing plaintiff's complaint, we do not do so because of any failure of the district court to apply correctly the guidelines articulated in Heyman v. Commerce & Industry Insurance Co., 524 F.2d 1317, 1319-20 (2d Cir. 1974), in ruling on the defendant's motion for summary judgment. The court below did not "try issues of fact," nor did it fail to "resolve all ambiguities and draw all reasonable inferences" in plaintiff's favor. The court below merely found that, assuming plaintiff's claims to be meritorious, an FTCA action, and not a Bivens action, was the only available vehicle for the presentation of those claims in a federal forum.

[6] Counsel for appellant argued that the FTCA was an inadequate alternative inasmuch as punitive damages were not recoverable, 28 U.S.C. 2674, and trial by jury was unavailable, 28 U.S.C. §2402. The district court expressed doubt as to whether punitive damages would be recoverable in a Bivens type action, and concluded "there seems to be no reason to assume that they are not, since assault and battery (the torts which parallel the constitutional interest asserted by Hernandez) are typical of the intentional torts for which punitive damages may be awarded...." Memorandum and Order, at 6. We find it unnecessary to comment upon this lower court dictum. Even the issue of whether compensatory damages should be awarded this plaintiff was never reached below; nor has it been here.

[7] 28 U.S.C. §1346 gives the district court original jurisdiction and concurrent jurisdiction with the Court of Claims over claims against the United States. Subsection(b) of §1346, along with

28 U.S.C. §267; et seq., were designed primiarly to remove the sovereign immunity of the United States from suits in tort, and with certain exceptions, to render the government liable in tort as a private individual would be under like circumstances. The exceptions preserving sovereign immunity are set out in 28 U.S.C. §2680. Subsection(h) of §2680 preserves immunity with respect to claims arising out of false imprisonment, false arrest, etc. Public Law 93-253, §2, however, amended §2680(h) by adding the following proviso:

> Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.

The defendants fall within the definition of "investigative or law enforcement officers" by virtue of 18 U.S.C. §3050, which empowers officers or employees of the Bureau of Prisons of the Department of Justice to make arrests.

[8] As was said when the Bivens case was first before us:

> It is my thought that by virtue of 28 U.S.C. §1331 the federal courts can also entertain this cause of action irrespective of whether a statute exists specifically authorizing a federal suit against federal officers

> for damages allegedly occasioned by their unnecessarily severe acts....
> . . . .It seems evident to me, therefore, that, logically, if we should wish to ensure to an individual the fullest protection of his constitutional rights, an action against federal officers for trespassory damages should be maintainable in the federal courts.

409 F.2d 718, 726 (2d Cir. 1969) (Waterman, J., concurring).

[9] The Collinsville raids involved abuses of the federal no-knock statute (28 U.S.C. §879) by federal law enforcement officers which amounted to prima facie violations of the Fourth Amendment. The most notorious of the raids occurred in April 1973. In two separate incidents the same federal agents conducted no-knock raids on two different homes. "The agents entered the two houses without warrants in violation of the Federal 'no-knock' statute, kicked in the doors without warning, shouting obscenities, and threatening the occupants with drawn weapons. The terrified inhabitants were only temporarily relieved when the agents left after discovering that they had entered the wrong houses." At the time the raids were conducted the innocent victims were without a legal remedy against the federal government for physical damage, much less for the pain, suffering, and humiliation to which the families were subjected, due to the bar of sovereign immunity. Inasmuch as no evidence was seized and the individuals were never arrested, nor ever suspected of wrongdoing, the traditional remedy for Fourth Amendment violations - the exclusionary rule - was a totally inadequate remedy.

The committee, while recognizing the private right of action against the individual officers created by Bivens, supra, determined that the private cause of action was a "hollow remedy"

because "Federal agents are usually judgment proof." The codification of the doctrine of sovereign immunity as evidenced by the Federal Tort Claims Act (28 U.S.C. §§2671-2680) was viewed by the committee as manifestly unjust. The amendment deprives the federal government of the defense of sovereign immunity in any case where federal law enforcement agents, acting within the scope of their employment, or under color of federal law, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. See S.Rep. No. 93-588, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Admin. News at 2790-91.

See note 5, supra.